

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ERIK KELLGREN, individually and on
behalf of all others similarly situated,
Plaintiffs,

v.

PETCO ANIMAL SUPPLIES, INC.;
PETCO HOLDINGS, INC.; and DOES 1
to 100, inclusive, ,
Defendants.

Case No.: 3:13cv644L(KSC)

**ORDER GRANTING IN PART AND
DENYING IN PART JOINT
MOTION REGARDING
DEFENDANTS PETCO ANIMAL
SUPPLIES, INC., AND PETCO
HOLDINGS, INC.'S MOTION TO
DISMISS CERTAIN OPT-IN
PLAINTIFFS FOR FAILURE TO
RESPOND TO DISCOVERY AND
COMPLY WITH COURT ORDERS**

[Doc. No. 179]

Before the Court is a Joint Motion Regarding Petco Animal Supplies, Inc., and Petco Holding, Inc.'s ("Defendants") Motion to Dismiss Certain Opt-In Plaintiffs for Failure to Respond to Discovery and Comply with Court Orders filed by defendants. [Doc. No. 179.] Defendants seek a Court Order that: (1) dismisses with prejudice the Non-Responsive Opt-In plaintiffs for failure to respond to discovery and failure to prosecute their claims; or, in the alternative, (2) compels the Non-Responsive Opt-In plaintiffs to respond to discovery

1 within thirty days of the date of this Order or face dismissal with prejudice. *Id.* at p. 5. Also,
 2 counsel for plaintiffs seek leave from the Court to withdraw as counsel for certain Non-
 3 Responsive Opt-Ins. *Id.* at p. 18. For the reasons addressed more thoroughly below, the
 4 Joint Motion is **GRANTED** in part and **DENIED** in part. [Doc. No. 179.]

5 **I. BACKGROUND**

6 This is a collective action in which plaintiffs Erik Kellgren ("Kellgren") and others
 7 employed as Assistant Managers in defendants' stores claim to have been misclassified as
 8 "exempt" from the overtime provisions of the Fair Labor Standards Act of 1938, 29 U.S.C.
 9 201, *et seq.* ("FLSA"). The central issues in the case relate to the duties plaintiffs performed
 10 in the course of their employment, and whether they worked over 40 hours a week during
 11 the relevant time frame.

12 **II. DISCUSSION**

13 **a) Defendants' Request To Dismiss With Prejudice The Non-Responsive** 14 **Plaintiffs For Failure To Respond To Discovery And Failure To Prosecute** 15 **Their Claims.**

16 The instant dispute concerns certain provisions in the Scheduling Order issued by
 17 this Court on March 29, 2016 [Doc. No. 117] and a subsequent Order issued on August 1,
 18 2016 modifying the March 29, 2016 Scheduling Order. [Doc. No. 168.] Pursuant to the
 19 August 1, 2016 Order, defendants could serve limited written discovery on up to 25%, or
 20 118, of the opt-in class of plaintiffs ("Discovery Opt-Ins"). [Doc. No. 168, p. 7; Doc. No.
 21 179, p. 6.]

22 Defendants assert that after the August 1, 2016 Order was issued, the parties
 23 developed a process for selecting the representative group of 118 Discovery Opt-Ins to
 24 respond to defendants limited written discovery. [Doc. No. 179, p. 6.] Defendants assert
 25 that the parties agreed that the Discovery Opt-Ins would serve written responses to
 26 defendants' discovery in four batches, on dates beginning on September 7, 2016 and
 27 concluding on October 21, 2016. *Id.* at p. 7. Defendants subsequently agreed to extensions
 28 for some of the deadlines. *Id.* As of October 26, 2016, the deadlines for responses passed

1 for all of the original 118 Discovery Opt-Ins, but the parties had met and conferred only as
 2 to the first three batches of Discovery Opt-Ins, consisting of 94 individuals.¹ *Id.* Of the 94
 3 Discovery Opt-Ins, defendants identify a group of eighteen “Non-Responsive Opt-Ins” in
 4 their Motion for whom they now seek dismissal, with prejudice.² *Id.* at pp. 5, 8.

5 In the Joint Motion, counsel for the Discovery Opt-Ins, Klafter Olsen & Lesser, LLP
 6 (“KOL”) and Hepworth, Gershbaum and Roth PLLC (“HGR”) (together as “Plaintiffs’
 7 Counsel”), seek leave from the Court to withdraw as counsel for certain Non-Responsive
 8 Opt-Ins. *Id.* at p. 18. Plaintiffs’ counsel asserts that they “are not in a position to respond
 9 to [defendants’] motion because of a breakdown in the attorney-client relationship with the
 10 Non-Responsive Opt-Ins.” *Id.* Plaintiffs’ counsel asserts that:

11 In light of the cross-motion to withdraw, Plaintiffs (excluding the Non-
 12 Responsive Opt-ins) take no position on the propriety of the next steps,
 13 including Defendants’ position that the Non-Responsive Opt-ins’ claims
 14 should be dismissed. While such a dismissal order would, in Plaintiffs’
 15 counsel’s experience, not be unusual, Plaintiffs’ counsel believes that, as has
 16 most often been done, any such dismissal should be without prejudice.
 17 *Id.* at pp. 20-21.

18 Plaintiffs further suggest that:

19 [W]aiting until all the discovery responses are due, on December 5, 2016,
 20 prior to issuance of a final order is a better approach, rather than multiple,
 21 piecemeal motions on the same topic. Waiting to address dismissal, will also
 22 enable the Court to determine whether other Non-Responsive Opt-[I]ns exist
 23 and will allow it to ensure that the final number of discovery opt-ins is
 24 consistent with the numbers contained within the Court’s August 1, 2016
 25 Order.

26 ¹ Defendants note that they have not had an opportunity to analyze the Discovery Opt-Ins responses
 27 received after October 21, 2016, and thus the parties have not met and conferred about any deficiencies
 28 in those responses. [Doc. No. 179, p. 7.] Defendants further note that they bring this Motion as to all
 Non-Responsive Discovery Opt-Ins who have been identified and about whom the parties have met and
 conferred as of October 26, 2016. *Id.* Defendants anticipate that they may have to file a future motion to
 dismiss if additional individuals fail to timely respond to the discovery at issue. *Id.*

² Defendants note that if the Court does not have authority to dismiss the claims outright, they request
 that the Court issue a Report and Recommendation to the District Judge recommending dismissal of the
 Non-Responsive Opt-Ins’ claims. *Id.* at p. 5.

1 *Id.* at p. 21.

2 The defense anticipates filing a future motion to dismiss based on its analysis and
 3 meet and confer efforts of the responses received on October 24, 2016 and October 25,
 4 2016, and/or if additional individuals fail timely to respond. *Id.* at p. 7. The defense notes
 5 that it filed the instant Motion in accordance with the due date provided in Section V of the
 6 Court's Chamber Rules -- Civil Pretrial Procedures. *Id.* As provided therein, "[u]nless
 7 otherwise ordered, discovery motions shall be filed no later than 45 days after the event
 8 giving rise to the dispute and only after counsel have met and conferred. . . . For written
 9 discovery, the event giving rise to the dispute is . . . the passage of a discovery due date
 10 without response or production." [Judge Crawford's Civil Chambers Rules, Section V, A,
 11 at p. 4.]

12 Having considered the parties' arguments, the Court **DENIES** defendants' request
 13 to dismiss with prejudice the claims of eighteen Non-Responsive Opt-In plaintiffs who
 14 have failed to timely respond to Petco's discovery requests. The Court notes that it does
 15 not have the authority to dismiss the claims outright, but **DENIES** defendants' request to
 16 issue a Report and Recommendation to the District Judge recommending dismissal of the
 17 Non-Responsive Opt-Ins' claims at this time.

18 **b) Defendants' Request To Compel The Non-Responsive Opt-In Plaintiffs To**
 19 **Respond To Discovery Within Thirty Days Of The Date Of This Order Or**
 20 **Face Dismissal With Prejudice.**³

21 In the alternative to its request for dismissal, defendants seek an Order pursuant to
 22 FRCP 37(a)(3)(B), "to be personally served on the Non-Responsive Opt-Ins by their
 23 counsel, compelling the Non-Responsive Opt-Ins to Respond to [defendants'] written
 24 discovery requests within thirty days of the date of the order, and explicitly stating that a

25
 26
 27 ³ Defendants note that the instant Motion is brought within 45 days of the date the first group of Non-
 28 Responsive Opt-Ins failed timely to respond to defendants' discovery requests, as required by this Court's
 Chambers Rules. *Id.* at p. 9.

1 failure to comply will result in dismissal of their claims with prejudice pursuant to
2 37(b)(2)(A).” *Id.* at p. 16. Defendants assert that the identified Non-Responsive Opt-Ins
3 are plaintiffs who “failed to submit discovery responses, and whom Plaintiffs’ counsel has
4 identified as non-responsive.” *Id.* at p. 8.

5 This Court finds good cause to provide the Non-Responsive Opt-Ins a final
6 opportunity to comply with their discovery obligations. Consequently, the Court
7 **GRANTS** defendants’ request to compel the Non-Responsive Opt-In plaintiffs to respond
8 to defendants’ written discovery requests within **thirty days** of the date of this Order. The
9 Court hereby notifies the Non-Responsive Opt-In plaintiffs and their counsel that failure
10 to respond to defendants’ written discovery requests within **thirty days** of the date of this
11 Order will result in this Court issuing a Report and Recommendation for dismissal of the
12 Non-Responsive Opt-In plaintiffs’ claims with prejudice pursuant to Rule 37(b)(2)(A).
13 The Court **ORDERS** plaintiffs’ counsel, pursuant to FRCP 37(a)(3)(B), to personally
14 serve a copy of this Order on the Non-Responsive Opt-In plaintiffs, with return receipt
15 requested.

16 Regarding any anticipated future Joint Motions to Dismiss or Compel additional
17 Non-Responsive Opt-In plaintiffs [Doc. No. 179, pp. 7, 10], in the interest of judicial
18 efficiency, the Court hereby **GRANTS** the parties leave until on or before **January 23,**
19 **2017** to file such a Motion. The parties shall file a *single* Joint Motion to Dismiss or Compel
20 the additional Non-Responsive Opt-In plaintiffs, limited to **20 pages or less**. The parties
21 are required to have met and conferred pursuant to the District Local Rules, and this Court’s
22 Chamber Rules before filing the anticipated Joint Motion to Dismiss or Compel on or
23 before January 23, 2017.

24 **c) Plaintiffs’ Counsel’s Request To Withdraw As Counsel For Certain Non-**
25 **Responsive Opt-In Plaintiffs.**

26 To the extent that plaintiffs’ counsel seeks leave from the Court to withdraw as
27 counsel for certain Non-Responsive Opt-Ins [Doc. No. 179, p. 18], plaintiffs must file a
28

1 separate motion before the District Court Judge assigned to this matter. Accordingly,
 2 plaintiffs' motion to withdraw as counsel for certain Non-Responsive Opt-Ins is **DENIED**
 3 without prejudice.


4 **III. CONCLUSION**

5 For the foregoing reasons, the Joint Motion is **GRANTED** in part and **DENIED** in
 6 part. [Doc. No. 179.]

- 7 1. The Court **DENIES** defendants' request to dismiss with prejudice the claims
 8 of eighteen Non-Responsive Opt-In plaintiffs who have failed to timely
 9 respond to Petco's discovery requests. The Court notes that it does not have the
 10 authority to dismiss the claims outright, but **DENIES** defendants' request to
 11 issue a Report and Recommendation to the District Judge recommending
 12 dismissal of the Non-Responsive Opt-Ins' claims.
- 13 2. The Court **GRANTS** defendants' request to compel the Non-Responsive Opt-
 14 In plaintiffs to respond to defendants' written discovery requests within **thirty**
 15 **days** of the date of this Order. The Court hereby notifies the Non-Responsive
 16 Opt-In plaintiffs and their counsel that failure to respond to defendants' written
 17 discovery requests within **thirty days** of the date of this Order will result in this
 18 Court issuing a Report and Recommendation for dismissal of the Non-
 19 Responsive Opt-In plaintiffs' claims with prejudice pursuant to 37(b)(2)(A).
 20 The Court **ORDERS** plaintiffs' counsel, pursuant to FRCP 37(a)(3)(B), to
 21 personally serve a copy of this Order on each Non-Responsive Opt-In plaintiff,
 22 with return receipt requested.
- 23 3. The Court **GRANTS** the parties leave until on or before **January 23, 2017** to
 24 file a Joint Motion to Dismiss or Compel the additional Non-Responsive Opt-
 25 In plaintiffs. The parties shall file a *single* Joint Motion to Dismiss or Compel
 26 the additional Non-Responsive Opt-In plaintiffs, limited to **20 pages or less**.
- 27 4. The Court **DENIES** without prejudice plaintiffs' motion to withdraw as
 28 counsel for certain Non-Responsive Opt-Ins.

1 **IT IS SO ORDERED.**

2 Date: November 23, 2016

A handwritten signature in black ink, appearing to read 'Karen S. Crawford', is written over a horizontal line.

KAREN S. CRAWFORD
United States Magistrate Judge